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# Mandatory Pro Bono

Roger C. Cramton

*Cornell Law School, rcc10@cornell.edu*

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# MANDATORY PRO BONO

*Roger C. Cramton\**

Should lawyers be required to devote a portion of their time or money to public service activities? This issue, commonly referred to as "mandatory pro bono," is much discussed these days. The purpose of this article is to illuminate the policy choices before the profession by surveying the arguments for and against mandatory pro bono.<sup>1</sup> You may recall the sagacious comments of Woody Allen concerning the dilemma of choice:

One path leads to despair and utter hopelessness.

The other, to total extinction.

Let us pray we have the wisdom to choose correctly.<sup>2</sup>

Fortunately, the choice in this instance is between relative goods rather than between two disastrous outcomes.

My involvement in civil legal assistance for the poor dates from 1975 to 1979, when I served as the first chairman of the board of the national Legal Services Corporation.<sup>3</sup> Those were heady years when the federally funded legal services program was reaching out in an attempt to provide quality service to a growing portion of the nation's

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\* Robert S. Stevens Professor of Law, Cornell University. Valuable research assistance was provided by Julia H. Lee '92, Cornell Law School.

1. Although brief consideration is given to legal and constitutional issues, see *infra* notes 99-104, I take the view that mandatory pro bono is primarily a policy question turning on normative judgments and prudential considerations. Even if the constitutional issues are resolved in favor of mandatory pro bono proposals, however, the concerns raised in that context suggest caution. For discussions of the policy aspects of mandatory pro bono proposals, see D. LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL INQUIRY* 240-89 (1988) [hereinafter LUBAN] (urging a "practical" pro bono proposal after considering and rejecting opposing arguments); R. ABEL, *AMERICAN LAWYERS* 128-40 (1989) [hereinafter ABEL]; Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U.L. REV. 735 (1980) (focusing on the legal authority of courts to appoint private counsel to handle litigation and generally opposed to mandatory pro bono); Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255 (1981); Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 55-75 (1990); Note, *Why Mandatory Pro Bono Is a Bad Idea*, 3 GEO. J. LEGAL ETHICS 623 (1990).

2. W. ALLEN, *My Speech to the Graduates*, in *SIDE EFFECTS* 57 (1980).

3. See Drew, *A Reporter at Large: Legal Services*, NEW YORKER 97 (Mar. 1, 1982) (discussing the formation and activities of the Legal Services Corporation, 1974-82).

poor. During the last ten years, when the federal program has fallen on relatively hard times,<sup>4</sup> I have viewed developments from afar. Now things are heating up and mandatory pro bono is a hot topic.<sup>5</sup>

### NEW YORK PLAN

In April 1988, Chief Judge Sol Wachtler of the New York Court of Appeals appointed a committee (known as the Marrero Committee, named after its chairman) to study and report on ways of meeting the legal needs of the poor.<sup>6</sup> The committee's proposal is that the courts adopt rules compelling lawyers to donate 40 hours every two years to advance the legal needs of the poor.<sup>7</sup> Although the Marrero Committee stated that voluntary pro bono activities by the bar would be

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4. See Menkel-Meadow, *Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980s*, 22 OSGOODE HALL L.J. 30 (1984).

5. This article uses the New York proposal as a basis for discussion. The issues are much the same with respect to proposals under consideration elsewhere. See Note, *supra* note 1, at 632-41 (summarizing developments since 1980 in North Dakota, Oregon, Maryland, Florida, and California). The Maryland experience is extensively discussed in Millemann, *supra* note 1.

6. The Marrero Committee was appointed by Chief Judge Wachtler "to improve the availability of legal services" in New York (the quotation reflects the official title of the Committee). Its Final Report of April 27, 1990 proposed an obligation of all active lawyers to provide a minimum of 40 hours of qualifying pro bono legal services every two years. COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (April 1990), reprinted in 19 HOFSTRA L. REV. 755, 768 (1991) [hereinafter MARRERO REPORT]. Qualifying services, unlike under the MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1990) [hereinafter MODEL RULES] and other prior ABA policy statements, would be limited to services and activities on behalf of poor persons. MARRERO REPORT at 769. Some of the details of the Marrero proposal are discussed in the text.

7. The legal authority of the New York Court of Appeals to promulgate a court rule requiring lawyers to perform specified services for poor clients is discussed in the MARRERO REPORT. See MARRERO REPORT, *supra* note 6, at 814-19. Two dissenting members of the committee argued that "there is no basis for the Committee's proposal that New York's Constitution or existing statutes authorize the Chief Judge, or any other person or entity, to compel lawyers at large to render free legal services." Statement of Sol Neil Corbin, MARRERO REPORT, *supra* note 6, at 850. This paper does not deal with the question of legal authority, but only with the underlying policy issues. It should be noted that New York differs from most other states in that regulation of lawyers is not confined exclusively to the State's highest court. See C. WOLFRAM, MODERN LEGAL ETHICS 25 n.31 (discussing the statutory basis for the regulation of lawyers in New York) [hereinafter WOLFRAM]. In New York, unlike many states, there is legislation regulating the legal profession; and judicial regulation of the profession is carried on, not by the highest court, but by the intermediate appellate courts (the Appellate Divisions of the Supreme Court of New York). (In New York the "Supreme Court" is the trial court of general jurisdiction.) See WOLFRAM, *supra*, at 31 n.70.

inadequate,<sup>8</sup> Chief Judge Wachtler postponed any action on the report for two years, until May 1992, to determine whether bar encouragement of voluntary pro bono would suffice.<sup>9</sup>

The committee's mandatory pro bono proposal contains the following details:<sup>10</sup> Law firms could credit the excess hours of some firm lawyers to meet the obligations of others.<sup>11</sup> Lawyers in small firms of less than ten lawyers alone could satisfy their obligation by paying \$1,000 each to support legal service to the poor in lieu of time.<sup>12</sup> A third alternative permits law firms (or unaffiliated lawyers) to hire an attorney to discharge their collective obligation to donate their time.<sup>13</sup>

### BAR REACTION

The proposal, like mandatory pro bono plans elsewhere, has divided the bar.<sup>14</sup> Most bar leaders have come out in opposition to the plan, but individual lawyers and a few bar associations support it.<sup>15</sup> The Association of the Bar of the City of New York, which is representative of New York City's large firms, "reluctantly" but forcefully endorsed the proposal as essential to meet a 'desperate' need.<sup>16</sup> On the other hand, a large number of "county bar associations with members drawn mostly from smaller firms [have] strongly criticised the proposal as a form of 'conscription' and an unworkable

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8. MARRERO REPORT, *supra* note 6, at 768.

9. See Sack, *Judge Presses New York Bar to Help Poor*, N.Y. Times, May 2, 1990, at B1, col. 5; Fox, *6000 Lawyers to be Sent Pro Bono Poll; Wachtler Seeks to Gauge Scope of Statewide Effort*, N.Y.L.J., Jan. 23, 1991, at 1, col. 6 (stating that 6,000 randomly selected attorneys are to receive survey questionnaires as part of a campaign by Chief Judge Sol Wachtler to assess their pro bono efforts last year on behalf of the poor. Presumably, the matter will be reconsidered in May, 1992).

10. See MARRERO REPORT, *supra* note 6, at 783-814 (discussing the details of the proposal).

11. See *id.* at 856.

12. See *id.* at 855 (stating that these lawyers "may satisfy all, or part, of their qualifying services requirement by a payment of \$50.00 for each hour of qualifying services not performed.").

13. See *id.* at 798.

14. See, e.g., Wise, *Bar Leaders Resist Pro Bono Plan; Urge Wachtler Weigh Voluntary Effort*, N.Y.L.J. Oct. 17, 1989, at 1, col. 3 (stating that the leaders of nine county bar associations oppose mandatory pro bono and encourage increased voluntary efforts) [hereinafter Wise, *Bar Leaders Resist*].

15. See *id.*

16. Wise, *Bar Groups Split on Mandatory Pro Bono Plan*, N.Y.L.J., Oct. 20, 1989, at 1, col. 4.

'tax.'"<sup>17</sup> New York is likely to be similar to other states: a majority of lawyers and most bar associations oppose mandatory pro bono, but it has substantial and growing support.<sup>18</sup>

### THE UNDERLYING SOCIAL PROBLEM

There is general agreement that the problem the plan addresses—inequalities in the distribution of legal services—is a serious and intractable one. Legal services are made available primarily on a fee-for-service basis in the United States. Those who want lawyers and are able to pay for them have little difficulty finding reasonably competent professional services. The growing demand for legal services, coupled with high incomes in some sectors of the profession, has led to rapid growth in the number of lawyers and a marketplace for legal services that is extremely competitive.<sup>19</sup> Most lawyers provide counseling and transactional services to businesses and reasonably well-to-do individuals who seek out the services of these lawyers and who are able to pay rates that are strongly influenced by competitive pressures.<sup>20</sup> These services (e.g., drafting a will or checking a land title) will not be provided if the client is unable to pay the customary

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17. *Id.*

18. An earlier occasion for considering mandatory pro bono in New York was triggered by a report of a special committee of the Association of the Bar of the City of New York in 1979. The report recommended that "the profession move toward acceptance by every practicing lawyer of a *mandatory obligation . . . of public service practice.*" Assoc. of the Bar of the City of New York, Special Comm. on Pro Bono, *Toward a Mandatory Contribution of Public Service Practice by Every Lawyer* 5 (1979) [hereinafter *Mandatory Contribution*]. The report proposed an initial minimum obligation of 30-50 hours of service per year. *Id.* The report argues that a lawyer, "as a professional and as an officer of the law, has a unique responsibility and opportunity to make some contribution to the satisfaction" of "needs for legal services and reform of justice in our society." *Id.* at 9. Public service activities were broadly defined, but did not include bar association work unless it was "designed to improve, or increase the availability of legal services" to individuals or groups unable to pay fully. *Id.* at 6, 13. The committee concluded that "some flexibility in implementation is desirable" to reflect "individual circumstances." *Id.* at 5. A majority opposed imposition of a collective responsibility on law firms or a financial payment alternative to rendition of individual services. *See id.* *See also* Margolick, *Lawyers and Compulsory Public Service: Resisting the Inevitable*, N.Y. Times, Jul. 17, 1988, at B9, col. 1 (discussing the bar reaction to the proposed North Dakota plan); Hengstler, *Mandatory Pro Bono?*, 74 A.B.A. J. 28 (1988) (discussing the reaction to the proposed Maryland plan).

19. For discussion of changes in the size, structure, demographics, and competitive position of the legal profession, *see* ABEL, *supra* note 1, *passim*. *See also* *Mandatory Contribution*, *supra* note 18, at 8 (stating that the recent rapid passage of laws and regulations has caused a dramatic increase in the need for lawyers).

20. *See* ABEL, *supra* note 1, at 128.

fee.<sup>21</sup> Available alternatives (e.g., self-help, resort to non-lawyer service providers) are lower in cost, but are hemmed about by legal restrictions and concerns regarding the quality of service.<sup>22</sup>

Similarly, the availability of lawyers to those desiring to litigate is largely governed by the potential client's ability to pay. A potential plaintiff may decide to forego a claim<sup>23</sup> or, if an individual, may pursue it pro se. Experience teaches, however, that if the claim is to be pursued successfully a trial lawyer must be retained.<sup>24</sup> A defendant in litigation has even fewer options, since the plaintiff controls the initiation of litigation. Although the defendant may also proceed pro se, prudence ordinarily requires the defendant to hire a lawyer and to invest resources in defense commensurate with what is at stake.<sup>25</sup>

On the other hand, the American system of financing litigation does provide potential plaintiffs with two options that are available without regard to the plaintiff's ability to pay: the contingent fee and one-way fee shifting.<sup>26</sup> The contingent fee gives the poor plaintiff meaningful access to the courtroom by giving a lawyer an incentive to pursue a meritorious claim that will produce a substantial settlement or judgment. One-way fee shifting statutes tend to make competent lawyers available for the vindication of claims subject to fee-shifting by giving the prevailing plaintiff a separate award of reasonable attorney fees.<sup>27</sup> Each of these mechanisms must be kept in mind when considering the availability of lawyers to potential plaintiffs.

In addition to these partial mechanisms for making privately retained counsel available, public programs provide assistance to some

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21. See *id.* at 128-29.

22. See LUBAN, *supra* note 1, at 247 (describing the regulations restricting the unauthorized practice of law). See also *id.* at 244 (describing how the legal system is "designed to be operated by lawyers and not by laypersons.").

23. See ABEL, *supra* note 1, at 129 (stating that the "[u]se of lawyers is an acquired habit; most people never surmount the barriers of fear, ignorance and unfamiliarity."). See also LUBAN, *supra* note 1, at 259-60 (describing a situation where a potential plaintiff could not sue because she could not afford a lawyer or the court fees).

24. See *id.* at 245 (describing the difficulties that a lay person would have with self-representation).

25. See *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (describing the deficiencies of a pro se defense).

26. See Rowe, *American Law Institute Study on Paths to a Better Way: Litigation, Alternatives and Accomodation*, 1989 DUKE L. J. 824, 886-902 (discussing the effects of the contingent fee and one-way fee shifting).

27. See *id.* at 888-89.

poor people. During the last quarter century, publicly-funded civil legal assistance has grown from the small scale of traditional legal aid offices, operated as a local charity, to a substantial national program.<sup>28</sup> Prior to 1965, only about \$4 million annually was spent nationally on civil legal assistance.<sup>29</sup> The Office of Economic Opportunity (OEO) legal services program grew rapidly after 1965 before encountering strong political resistance.<sup>30</sup> The establishment of the Legal Services Corporation in 1975 led to the creation of a program of civil legal assistance that was national in scope and substantial in size.<sup>31</sup> At its peak in 1981 there were about 6,000 lawyers providing civil legal assistance to eligible poor through local legal services organizations throughout the country.<sup>32</sup> Since then, buffeted by lack of support from the executive branch and confusion about priorities and goals, the program has shrunk to about 4,000 lawyers.<sup>33</sup> About one-fourth of current funding comes from local and state funds, with the remaining three-fourths from the federal government.<sup>34</sup> Legal services lawyers are prohibited from taking cases in which private representation on a contingent-fee basis is likely to be available.<sup>35</sup>

The social arrangements by which legal services are delivered in the United States raise substantial concern about the fairness of their distribution. Publicly-funded civil legal assistance, the voluntary pro bono activities of lawyers, and the twin devices of the contingent fee and fee-shifting statutes each meet a portion of the legal needs of ordinary Americans. But for most Americans, most of the time, legal services are available only to those who are able and willing to pay relatively high professional charges. Low-income people are especially disadvantaged. As President Jimmy Carter stated in 1978: "No re-

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28. See generally E. JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM* (2d ed. 1978).

29. See Menkel-Meadow, *supra* note 4, at 35.

30. *Id.* at 38.

31. See *id.* See also Legal Services Corporation Act, Pub. L. 93-355, 88 Stat. 378 (1975) (establishing the Legal Services Corporation).

32. 1981 LEGAL SERVS. CORP. ANN. REP. pt. I, at 8.

33. See LUBAN, *supra* note 1, at 241-42 (stating that the Reagan administration's budget cuts caused the Legal Services Corporation's programs to lose thirty percent of their attorneys); Barr, *Doers and Talkers*, AM. LAW., July-Aug. 1990, at 51, col. 1 (discussing the Reagan Administration cutbacks in funding for the Legal Services Corporation).

34. See generally LEGAL SERVICES FOR THE POOR: TIME FOR REFORM (D.J. Besharov ed. 1990).

35. See Legal Services Corporation Act, *supra* note 31, at § 1007(b)(1), and regulations implementing these statutory restrictions, 45 C.F.R. § 1609. See also Cramton, *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521 (1981).

sources of talent and training in our own society, even including the medical care, is more wastefully or unfairly distributed than legal skills. Ninety percent of our lawyers serve 10 percent of our people. We are over-lawyered and under-represented."<sup>36</sup>

The working poor, and large portions of the middle class, encounter problems in selecting and paying lawyers. Often they go without legal services because the monetary and other costs of using the legal system are larger than their willingness to bear them.<sup>37</sup> For the poorest Americans, who may be dependent on welfare and other social benefits, the high cost of legal services is an even greater barrier to access to justice. The categorical assistance provided by public programs starts with a relatively arbitrary eligibility standard usually framed in terms of income and wealth.<sup>38</sup> The convenience of using these categories should not blind us to the fact that individuals at the margin have similar problems: those at the upper end of the permissible income can devote some resources to legal services; those who are just above the eligibility line have great difficulty paying for high quality legal services.

There are many poor persons in the nation as well as in New York State. About 13% of the U.S. population (over 30 million people) lives below the poverty line,<sup>39</sup> which now is defined as a family of four living on an annual income of less than \$12,000.<sup>40</sup> New York has 1.2 million households at or below 125% of the federal poverty line, which determines eligibility for federally funded civil legal assistance for the poor.<sup>41</sup> Fourteen thousand dollars (approx-

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36. Remarks at 100th Anniversary Luncheon of the Los Angeles County Bar Association, 14 WEEKLY COMP. PRES. DOC. 834, 836 (May 4, 1978).

37. See LUBAN, *supra* note 1, at 259-60.

38. See, e.g., Legal Services Corporation Act, *supra* note 31, at 383 (stating that the Legal Services Corporation must establish "maximum income levels . . . for individuals eligible for legal assistance under this title").

39. As of 1987, U.S. government statistics stated that 32,370,000 Americans were living below the poverty level. U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 38 (1989) [hereinafter STATISTICAL ABSTRACT]. See also *id.* at 456 (stating that by 1986, 13% of all American families, and 46% of all American families headed by single mothers, lived below the poverty level).

40. See STATISTICAL ABSTRACT, *supra* note 39, at 420 (providing separate listings of the poverty thresholds, adjusted for inflation, for families containing one to nine members for the years 1970 through 1986). See also LUBAN, *supra* note 1, at 241-243 (discussing the legal needs of the poor); MARRERO REPORT, *supra* note 6, at 771-79 (discussing the legal needs of the poor in New York State).

41. In New York, the percentage of the population living below the poverty line is approximately 14.6% as of 1987. MARRERO REPORT, *supra* note 6, at 772 (citing U.S. Census Bureau data); see also STATISTICAL ABSTRACT *supra* note 39, at 452 (stating that, as of



mately 125% of the poverty line figure)<sup>42</sup> is a substantial income in Bangladesh,<sup>43</sup> but it doesn't go very far in terms of a decent American standard of living.

Those living below the poverty line (hereinafter "the poor" or "poor people") encounter many legal problems, albeit not as many as people with more resources, but still quite a few.<sup>44</sup> Perhaps some legal needs or desires may be viewed as luxuries—a will or a name change, for example. Other kinds of civil legal assistance, however, involve more fundamental matters, such as the desire to straighten out family relations by means of divorce or child custody, obtain social benefits to which one is entitled, or fight eviction from one's home.<sup>45</sup> If a poor person is charged with crime, the state (since *Gideon v. Wainwright*<sup>46</sup>) must supply a defense lawyer;<sup>47</sup> but the courts have repeatedly declined to say that a defendant in a civil case has a constitutional right to a lawyer free of charge when liberty is

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1979, New York State had 2,299,000 people living below the poverty line, comprising 13.4% of its population, which is the highest percentage of any state in the northeast). Nationally, 43,500,000 or 18.1% of all Americans were living below 125% of the poverty level as of 1987. *Id.* at 456. By 1986, 18% of all American families headed by single mothers lived below 125% of the poverty level. *Id.*

42. See STATISTICAL ABSTRACT, *supra* note 39, at 452 (stating that for a family of four, \$14,514 was 125% of the poverty level in 1987).

43. See *id.* at 822 (listing national per capita incomes as of 1985 and stating that per capita income in the U.S. was \$16,240, while the per capita income in Bangladesh was \$143).

44. The draft final report of the *New York Legal Needs Study* states that low income households interviewed reported having experienced, on average, 2.37 non-criminal legal problems per household for which they had no legal help. New York State Bar Association Committee of Legal Aid, *New York Legal Needs Study: Draft Final Report*, at 17 (cited in MARRERO REPORT, *supra* note 6, at 19); see also 1978 LEGAL SERVS. CORP. ANN. REP. pt. I, at 8; *Mandatory Contribution*, *supra* note 18, at 8 (citing LSC's low estimate of 400,000 annual civil legal problems of New York City's poor, and its higher estimate of 2 million).

45. See Dean, *Legal Needs in New York*, N.Y.L.J., Nov. 20, 1989, at 3, col. 1 (citing a study on the legal need in New York, stating that " '[b]y far the most prevalent and the most serious' of legal problems facing poor persons throughout the state involve landlord-tenant relations. In New York City, 44.5 percent of the poor persons polled identified housing problems as their most serious unmet legal need," and listing other areas of need).

46. 335 U.S. 391 (1963).

47. The Sixth Amendment right of "assistance of counsel" "[i]n all criminal prosecutions" has gradually been expanded to include public provision of counsel to those unable to afford privately retained counsel. See *Powell v. Alabama*, 287 U.S. 45 (1932) (stating that provision of a lawyer is an essential ingredient of due process in a death penalty case); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (noting that the federal government must provide counsel to an indigent charged with a federal crime); *Gideon v. Wainwright*, 335 U.S. 391 (1963) (holding that an indigent charged with a felony in a state court is entitled to appointed counsel); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending *Gideon* to misdemeanors that can result in imprisonment).

not at stake.<sup>48</sup>

No one knows what proportion of the legal needs of the poor are now going unmet.<sup>49</sup> The federally-funded legal services program now provides about 4,000 lawyers nationwide, who meet a portion of the need.<sup>50</sup> Efforts since 1982 to encourage and support private bar involvement in legal services have had some success. In New York, for example, the number of lawyers volunteering their services has climbed from 6.6% to 18.5% of practicing lawyers.<sup>51</sup> But informed observers agree that there remains a tremendous unmet need, estimated at 75% to as much as 95% of the total legal needs of the poor.<sup>52</sup> The Marrero Report, which reviewed current data, stated that at least 86% of the total need was unfilled in New York State.<sup>53</sup>

### THE PROFESSIONAL IDEAL OF PUBLIC SERVICE

At the core of professional ideology is the idea that the special privileges of the profession are justified because its members are dedicated to the interests of clients and the public.<sup>54</sup> Although law-

48. Constitutional procedural due process does not generally confer on indigents a right to appointed counsel in civil matters not involving loss of liberty. *See Lassiter v. Dep't of Social Servs.*, 452 U.S. 18 (1981) (terminating parental rights of incarcerated mother); *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975) (noting that an indigent spouse in divorce proceeding involving child custody was not entitled to appointed counsel); *cf. Payne v. Superior Court*, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976) (stating that an indigent prisoner seeking to defend a civil suit is entitled to appointment of counsel at state expense).

49. However, a 1987 pilot survey commissioned by the American Bar Association estimated that nationwide, 80 percent of poor people's civil legal needs go unmet. Barr, *supra*, note 34 at 51, col. 2.

50. *See supra* notes 32-33.

51. *See Wise, supra* note 14, at 2; *see also* Dean, *supra* note 45, at 3 (stating that according to the New York Legal Study report authors, 7,000 of the 88,000 attorneys registered to practice in New York are enrolled in organized pro bono programs); *Mandatory Pro Bono—The Shape of Things to Come?*, A.B.A. J., Dec. 1, 1987 at 62, 63; MARRERO REPORT, *supra* note 6, at 777; Wise, *supra* note 14, at 1, col. 1. Robert J. Rhudy, President of the National Association of IOLTA programs, estimates that 130,000 of the nation's more than 750,000 lawyers are participating in organized programs providing civil legal assistance to the poor. Remarks of Robert J. Rhudy, in Legal Services Corporation, *The Legal Services Program: 1965-1990*, at 164 (1990) (transcript of conference).

52. LUBAN, *supra* note 1, at 241-243; *see also* Ferren, *Guidelines for Budgeting Pro Bono Legal Service*, DIST. LAW., Sept./Oct. 1980, at 28 (listing the percentages of filings that are pro se in various types of civil cases); Fried and Siegel, *The Unmet Need: Providing Legal Services to the Poor*, 55 FLA. B.J. 313 (1981) (estimating that "only 12-15 percent of the legal needs of the poor are being met").

53. *See* MARRERO REPORT, *supra* note 6, at 774.

54. *See* American Bar Association Commission on Professionalism, "In the Spirit of

yers earn their living by representing clients, they do so "in the spirit of public service."<sup>55</sup> An arduous process of selection, education, and socialization arms lawyers with the skills and the knowledge that are of great utility to their clients.<sup>56</sup> But the interests of a client are to be preferred over those of the lawyer; and the representation of the client occurs in a context in which the lawyer, as an officer of the court, vindicates the premises of the legal system.<sup>57</sup> The lawyer makes the adversary system work, but assists the search for truth and justice in ways that go beyond the negative command that the lawyer not violate the law in the course of representation. The professional ideal is that each lawyer should strive to make the legal system live up to its grand premise of equality before and under the law.<sup>58</sup>

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*Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* (1986), reprinted in 112 F.R.D. 243, 261 (1987) [hereinafter *ABA Professionalism Report*].

55. *Id.* The phrase comes from Roscoe Pound's definition of a profession:

The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.

R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953). A more elaborate definition prepared for the ABA Commission by sociologist Elliot Freidson includes as a central element, justifying the special privileges of the profession, that "the client's trust [will be inevitable because the client cannot adequately evaluate the quality of the service] is overbalanced by devotion to serving both the client's interest and the public good." *ABA Professionalism Report*, *supra* note 54, 112 F.R.D. at 261-62.

56. See *ABA Professionalism Report*, *supra* note 54, 112 F.R.D. at 261-62.

57. See *id.*

58. The classic modern statement of the profession's view of itself and its responsibilities is the report of the ABA-AALS Joint Conference on Professional Responsibility. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958). Professor Lon L. Fuller played a leading role in the formulation of the report. The legal profession, according to the Report, imposes special obligations on lawyers, who "must evidence a dedication, not merely to a specific assignment, but to the enduring ideals" of the profession. *Id.* at 1159. "Only such a dedication will enable [the lawyer] to reconcile fidelity to those he serves with an equal fidelity to an office that must at all times rise above the involvements of immediate interest." *Id.* The lawyer's role in partisan advocacy, for example, "is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man's capacity for impartial judgment can attain its fullest realization." *Id.* at 1161. This social framework sets limits on partisan advocacy:

The advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case. He plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature.

*Id.* at 1161. The Report also considers the lawyer's responsibilities as a counselor, as an agent in the private ordering of affairs, and the lawyer's responsibilities of public service. The central message is that everything a lawyer does, if done in accordance with the reasons and restraints implicit in a proper understanding of the lawyer's calling, is a form of public

Unlike other professions, lawyers have embodied their aspirations concerning access to justice in their codes of professional ethics.<sup>59</sup> The lawyers' codes, however, state the obligation of public service in aspirational rather than mandatory terms. Rule 6.1 of the Model Rules of Professional Conduct, effective in the majority of American states, provides that "[a] lawyer should render public interest legal service" and then specifies activities aimed at achieving that goal (including the provision of legal services to "persons of limited means . . . at no fee or a reduced fee)."<sup>60</sup> The wording of the rule reflects an explicit rejection of earlier drafts which mandated pro bono service. The comment states explicitly that this responsibility "is not intended to be enforced through disciplinary process."<sup>61</sup> The comment also states that "[t]he basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer."<sup>62</sup> The necessity for publicly funded legal assistance for the poor is recognized and "every lawyer" is urged to "support all proper efforts to meet this need for legal services."<sup>63</sup>

These aspirational pronouncements do not limit "public interest legal service" to lawyering for poor people. Legal work for "charitable groups or organizations" and activities to improve the law, the

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service. *See id.* at 1162. As beneficiary and defender of the adversary system, the lawyer is obliged to give reality to its underlying premise, equality before the law, by making legal services available to all and by providing representation to unpopular causes. *See id.* at 1216.

59. *See generally* J. KULTGEN, *ETHICS AND PROFESSIONALISM* 262-269 (1988) (discussing the extent to which various professional codes meet the professional ideal that proficient service be available to all who need it, without regard to ability to pay). Law, Kultgen concludes, "is the one profession that deals with the problem in any important way" in its professional code, but even its mention of a service obligation is narrow in scope and not subject to disciplinary enforcement. *Id.* at 265.

60. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1990).

61. MODEL RULE 6.1 comment (1990).

62. *Id.*

63. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 comment (1983). The MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969) also fails to mandate pro bono service. The subject is dealt with in various Ethical Considerations, but not in the Disciplinary Rules. EC 2-25 states that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . . Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged." EC 8-9 stated that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law . . . [and] lawyers should encourage, and should aid in making needed changes and improvements." EC 8-3 states that "[t]hose persons unable to pay for legal services should be provided needed services.

legal system or the legal profession also qualify as "pro bono publico service."<sup>64</sup> As previously indicated, the Marrero proposal would give credit only to services that are directly related to the delivery of legal services to persons categorized as poor.<sup>65</sup>

To what extent do lawyers voluntarily comply with these public service responsibilities? Various studies show that most lawyers do participate in some pro bono activities,<sup>66</sup> but much of that time is directed toward activities that build relations with other lawyers, such as bar association work, or work that is designed to attract clients, such as free or reduced-rate work for local charities.<sup>67</sup> Although lawyers probably devote more time to public service activities than any other profession, there is an inevitable shortfall between the ideal of equal access to justice and the realities of today's world.<sup>68</sup>

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64. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1990).

65. MARRERO REPORT, *supra* note 6, at 768-69.

66. According to *American Lawyer's* survey of 86 of the nation's wealthiest law firms, the average lawyer in a big firm works approximately 40 hours a year on pro bono work. The survey focused on legal work done by lawyers, excluding support staff time, and did not include charitable contributions. Barr, *supra* note 33, at 54, 56. Deborah Rhode notes that the "average investment from the bar as a whole, according to another survey, was 6.2 percent of billable hours." Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 699 (1981).

67. See Barr, *supra* note 33, at 51 (listing the specific nature of pro bono work undertaken by 86 of the largest firms in the nation. Also examining pro bono time, counting only legal hours as opposed to non legal work such as serving on a board, an ABA committee, or fundraising). A 1982 survey conduct by the ABA showed that 68% of lawyers polled contributed time in uncompensated public service activities. Among those who do participate, the greatest percentage of their time was spend in work for charitable organizations. *Law Poll*, 68 A.B.A. J. 912 (1982).

68. David L. Chambers of the University of Michigan Law School has been engaged in annual surveys of that school's graduates for a number of years. One survey provided information concerning the pro bono attitudes and interests of graduates of two classes in the early 1970s and two classes in the early 1980s. At the time of the survey, the older graduates were 15 years out of school and the younger graduates were 5 years out of school. A majority of both groups opposed mandatory requirements that lawyers devote a specified amount of time each year to pro bono legal services, but the older classes were more strongly opposed. Graduates in both periods averaged about 30 hours per year of pro bono representation of clients; in addition, the younger graduates devoted about 20 hours per year to law-related pro bono work (e.g., bar committees, legal services boards), while the older graduates averaged 41 hours per year on such activities. Three-fourths of those in private practice were engaged in pro bono work, while the percentages were nearly reversed for those employed by governments and corporations (nearly two-thirds of these lawyers did no pro bono work). Private practitioners who did pro bono work averaged about 90 hours per year, approximately two weeks of work. Although some of the activity may be good public relations or aid in client cultivation, the total effort is still substantial. D.L. Chambers, *Pro Bono Work by Michigan Graduates: Attitudes and Performance* (1986) (unpublished survey).

## THE ARGUMENT FOR MANDATORY PRO BONO

Most lawyers will agree with the following assumptions.<sup>69</sup> First, poor people encounter legal problems with some frequency. Although it is true that having more resources gives rise to a somewhat greater use of lawyers, poor persons are subject to regulatory regimes involving public benefits and facilities that give rise to special legal needs.<sup>70</sup> The legal problems of the poor, like those of other Americans, range from the simple and routine to the highly complex.<sup>71</sup> As with other groups, investments in legal services can explore and create legal uncertainties which further legal investments can then shape in the interests of those receiving the service.

Second, the assistance of lawyers is either essential or highly advantageous in dealing with court or administrative proceedings such as housing evictions,<sup>72</sup> divorces,<sup>73</sup> or simple bankruptcies.<sup>74</sup> Although paralegals or non-lawyers could handle many routine tasks, especially if the opposing interests are also represented by non-lawyers, a poor person is at a severe disadvantage if an experienced and able lawyer is representing the opposing interest.<sup>75</sup> These are situations in which the absence of legal representation has a major effect on the outcomes of such proceedings.

Third, the widespread unavailability of legal assistance to poor persons undermines ideals we all take seriously (e.g. equal justice under law, access to the legal system, and the rule of law).<sup>76</sup> As previously indicated, the belief system of the legal profession is founded on these ideals. Severe departures from them give rise to

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69. See *supra* notes 20-53 and accompanying text.

70. See Barr, *supra* note 33, at 51 (noting that in a 1989 study of legal needs by the Chicago and Illinois Bar Associations it was concluded that to obtain basic rights and necessities such as food and housing, "society has made its most vulnerable citizens deal with an increasingly complex state bureaucracy and a confusing legal system").

71. See *supra* notes 44-48 and accompanying text.

72. See Dean, *supra* note 45, at 3, col. 1. The New York Legal Needs Study found that 44.5% of poor persons questioned indicated that housing problems were their most serious unmet legal need. See *id.*

73. The New York Legal Needs Study concluded that it is nearly impossible for low income people to find a lawyer for a contested divorce. See *id.* at 7, col. 1.

74. Dean noted that the typical consumer case involved a low income person enrolled in a vocational program where he or she either went into debt to pay the tuition and never received the promised training or a refund of the tuition. See *id.*

75. See *id.* at 3, col. 2 (noting that where tenants were represented by counsel, evictions were averted in over 90% of the cases. However, where tenants were not represented by counsel, 85% of the cases were estimated to have ended in eviction).

76. See MARRERO REPORT, *supra* note 6, at 775.

self-doubt and external attack: Is the ideal of professional service merely a facade that conceals an attempt on the part of lawyers to advance their own status and reward at the expense of the community?

The case for mandatory pro bono rests on the undisputed fact that there is a serious social need that is not being met by the present system, which includes the volunteer efforts of lawyers.<sup>77</sup> The next step in the argument is that lawyers have a special responsibility to provide legal assistance to the poor because of the profession's public commitment to justice<sup>78</sup> and its monopoly of the provision of legal services<sup>79</sup>. Therefore, proponents argue, the profession must take upon itself the obligation of meeting the poor's most serious needs. At least it must do so until the problem can be handled by other means, such as greater taxpayer support of legal services or judicare programs.

The remainder of this article considers the practical and moral objections to mandatory pro bono in the light of underlying policy considerations. Although important, the constitutional issues are not emphasized.<sup>80</sup> The policy issues are in the foreground and may be the decisive factor in rejecting mandatory service. Although constitutional doubts influence the discussion by suggesting a cautious approach respectful of the rights asserted,<sup>81</sup> I believe that the policy issues are likely to be determinative. If American states, by judicial rule or legislative action, impose a limited pro bono service requirement on licensed lawyers, it is likely that its constitutionality will be

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77. See *supra* notes 18-46 and accompanying text.

78. See MARRERO REPORT, *supra* note 6, at 782 (stating that "[m]uch of the law and what lawyers do is about providing justice, a principle that few lawyers would hesitate placing nearer to the heart of our way of life and guarded more closely than the services provided by other professionals. The legal profession serves as indispensable guardians of our lives, liberties and governing principles.").

79. See *id.* at 780.

80. Federal constitutional issues presented by mandatory pro bono proposals are briefly discussed *infra* at notes 99-104.

81. Professor David Shapiro's careful consideration of the constitutional issues concludes that

[n]one of the constitutional questions discussed here, except perhaps some aspects of that under the thirteenth amendment, is easily resolved. My own view is that any system or practice of required service must leave room for the conscientious objector, that a lawyer who is especially heavily burdened by such a system has a valid constitutional objection, and that a broader constitutional challenge to a system of compulsory service without adequate compensation might fail, but only by a whisker.

Shapiro, *supra* note 1, at 777.

sustained. Successful legal attacks are more likely to turn on constitutional or statutory authority to enact the requirement in a particular state, rather than on federal constitutional grounds.

### PRACTICAL OBJECTIONS TO MANDATORY PRO BONO

There are practical and moral objections, however, to the imposition of a pro bono obligation on all lawyers. The practical objections are:

First, will mandatory pro bono lead to low quality or highly inefficient representation? Compelling lawyers to provide free legal services may result in grudging and low quality service.<sup>82</sup> More important, the legal problems of poor people involve special knowledge and skills that many private practitioners usually lack.<sup>83</sup> Is an office lawyer specializing in corporate tax matters likely to be useful in handling an eviction case in a housing court, a child custody dispute, or a complicated welfare benefits matter? An able lawyer can pick up these skills given sufficient training and hard work. Moreover, "[c]ompetency," as Michael Millemann correctly states, "is a comparative concept."<sup>84</sup> A recent law graduate, despite seven years of higher education, may have limited competency in doing many things that experienced lawyers do every day. Yet most graduates can build on what they know, assisted by advice from more experienced lawyers, to carry out many routine legal tasks in a reasonably satisfactory manner.<sup>85</sup> Some frequent problems of poor people (e.g., divorce, landlord-tenant, commercial problems) draw on common-law or other materials familiar to many lawyers. A lawyer unexperienced in poverty law, by selecting an area drawing on skills or knowledge that the lawyer has and supplementing this with some educational effort, may provide highly satisfactory representation to poor clients.<sup>86</sup> The question remains, however, whether the quality of services performed grudgingly and by command will be adversely affected.

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82. Wise, *supra* note 14, at 1, col. 5 (quoting A. Thomas Levin, President-Elect of the Nassau County Lawyer's Association as saying "[i]t's wrong to tell people they have to do something. You can't mandate good work").

83. *But see* MARRERO REPORT *supra* note 6, at 812 (noting that lawyers are known to be generalists, and as such have a capacity to master the unfamiliar complexities of the cases in areas of the law in which they have little or not prior experience).

84. Millemann, *supra* note 1, at 62.

85. *See id.*

86. *See id.* at 60 (noting that there is "little of domestic law practice that is unique to the poor").



Viewed in light of the alternatives—no representation or self-representation—the competency problem is overstated. The more serious issue is that of efficiency: would a dollar contribution used to employ poverty law specialists provide more and better service? Funds for the provision of training, backup, and support of thousands of compelled lawyers might better be spent in hiring poverty law specialists to do the job. The Marrero proposal addresses this objection in part through its buy-out provisions: large-firm lawyers may assign associates to meet the firm's obligation; and small firm lawyers can pay off their obligation in cash by paying \$1,000 per year.<sup>87</sup> Committed and specialized legal services lawyers will then be hired to handle poor people's problems.<sup>88</sup>

Second, administrative and enforcement problems are substantial and troublesome. If voluntary bar associations impose the requirement, their membership may drop. If courts require all lawyers to donate their time, some lawyers may refuse to comply. If a substantial number of lawyers did so, the disciplinary authority would be placed in a difficult posture. A failure to punish conscientious disobedience might encourage general non-compliance; selective prosecution of a few visible violators would raise fairness questions; and proceeding against all violators would strain disciplinary resources and engender increased resentment on the part of many lawyers. There are strong moral, practical, and legal grounds for recognizing a conscientious objection exception to any program of mandated service. Moreover, problems of inclusion and enforcement need to be handled. Will the requirement apply to lawyers engaged in teaching, politics, business, or full-time government service? How will the requirement be policed? A substantial bureaucracy would be required to screen the reports of nearly 90,000 New York lawyers<sup>89</sup> in order to see whether they were in compliance with the rule.

Further, the details of any proposal raise large issues of fairness and administrative process. The Marrero proposal, for example, is attacked by some because its obligations are said to fall more heavily on solo or small-firm lawyers than they do on large-firm practitioners.<sup>90</sup> Those who are new to the profession or who are struggling

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87. See MARRERO REPORT, *supra* note 6, at 799-806 (discussing options involved in compliance with the proposal).

88. See *id.*

89. See STATISTICAL ABSTRACT, *supra* note 39, at 178 (stating that as of 1985, there were 72,575 practicing lawyers in New York).

90. See *Mandatory Pro Bono: Should the New York Bar Require 20 Hours of Pro Bono*

to make a living as a lawyer may find the pro bono requirement especially onerous, while senior partners in major law firms will find it easy to let the law firm provide an institutional response.

Third, the actual effects of a mandatory pro bono program on the delivery of legal services depend very largely on how the obligation is defined and enforced. Unless the pro bono obligation is restricted to a particular need, such as legal services for the poor, it may not result in greater representation of poor people.<sup>91</sup> Most of the pro bono effort of lawyers today involves participation in bar association activities or volunteered services to friends and community organizations.<sup>92</sup> If these latter activities count in meeting the pro bono obligation, lawyers will be more active in bar association work, will give more self-promoting speeches to church groups, and do more free legal work for in-laws and country clubs. On the other hand, if an effort is made to limit the pro bono obligation to free legal services for the poor, this will have a negative impact on participation in bar activities and on the reduced-fee work that many lawyers now provide to low-income people, community groups, and charities.<sup>93</sup>

There is a further problem in restricting the scope of qualifying activities to work directly related to the legal needs of those categorized as persons eligible for certain public benefits (the eligible poor). Many lawyers in sole or small firm practice currently provide reduced fee service to the near poor or the working poor. Such practitioners will be disadvantaged by the Marrero proposal because their services are not provided on a free basis, as is required by the proposal. If lawyers do not have a broad choice of how they are to help the eligible poor, it is likely that the assigned activities will be objectionable to some. Individual-client service for the poor (e.g., a divorce or an individual bankruptcy) have little or no political coloration, but the law reform activities of public interest lawyers often seek institutional or other change that will redistribute income to certain groups or further political organization of poverty groups. These activities are not objectionable in themselves, quite the contrary, but when the state

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*a Year? No*, A.B.A.J., Oct. 1989, at 53.

91. See LUBAN, *supra* note 1, at 278-279; MARRERO REPORT, *supra* note 6, at 142 (giving statement by Thomas F. Gleason).

92. See *supra* notes 63-66 and accompanying text.

93. See MARRERO REPORT, *supra* note 6, at 768 (stating that of three qualifying categories of services, only one addresses itself to charitable public interest organizations limited to matters which are designed predominantly to address the needs of the poor).

compels an individual to engage in activities of this character, serious concerns of individual freedom and expression may arise.<sup>94</sup> Prudence and good judgment suggest that any pro bono requirement provide each lawyer with a wide choice as to how it may be satisfied. This in turn suggests a broad definition of qualifying service. Model Rule 6.1 and the ABA declaration of policy in the Montreal Resolution<sup>95</sup> take this latitudinarian course.

Fourth, the imposition of a mandatory pro bono obligation on New York lawyers, not borne by their competitors in other states, will have adverse effects on the New York legal community. Whether a pro bono obligation takes the form of an exaction of time, money, or leaves this choice to the individual lawyer, it constitutes a special tax on lawyers. The tax burden is likely to fall in part on the lawyers subject to it and in part on clients who have few other options.<sup>96</sup> New York lawyers compete with lawyers elsewhere for a substantial portion of the legal business of large corporations, and competition will prevent the pro bono burden from being passed on to clients who can go elsewhere for their legal services. Incomes of New York lawyers will decline somewhat if New York lawyers bear costs that lawyers elsewhere do not carry. In sectors of the New York legal services market with high demand and limited supply, legal fees would rise to cover the cost of the pro bono obligation. Either way, whether New York lawyers or their clients bear the cost (probably it would be shared in varying proportions in different sectors of the legal services market), the overall effect would be a net migration of lawyers or legal business away from New York to competing locations. The magnitude of the pro bono obligation, and therefore the amount of the "tax" it imposes on New York lawyers, will determine the magnitude of this adverse economic effect. If all jurisdictions adopted the same proposal, there would be no differential effect on

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94. See *infra* note 99 (discussing the First Amendment challenge to mandatory pro bono).

95. The Montreal Resolution was adopted by the ABA House of Delegates in May 1975. It states that each lawyer has "a basic professional responsibility . . . to provide public interest legal services," and defines such service broadly as no-fee or reduced-fee work in poverty law, civil rights law, representation of charitable organizations, and activity to improve the administration of justice.

96. In the short run, economists tell us, the ability of lawyers to pass the burden of tax to their clients is dependent upon the slope of the demand curve for the particular legal service. The economic effects of taxes and regulatory requirements are the subject of a large and complex literature. See generally *THE ECONOMICS OF TAXATION* (Aaron & Boskin eds. 1980).

New York lawyers, although the cost of legal services nationally would increase somewhat.

### MORAL OBJECTIONS TO PRO BONO REQUIREMENT

The principal moral objections to mandatory pro bono are:

First, it is a violation of individual liberty to compel a lawyer to give her time to particular activities. Most of the decided cases involve the somewhat different issue of court appointment to provide representation in a particular case without compensation.<sup>97</sup> Institutional arrangements for the uncompensated appointment of lawyers to defend indigents in civil cases raise some special problems: they bear heavily on one group of lawyers (trial lawyers); the amount of time required of individual lawyers may be quite large; and the assignment program may be plausibly viewed as a failure by the state to fund an activity that is essentially a public function.<sup>98</sup> Nevertheless, such appointments or programs have been upheld against challenges based on the first amendment,<sup>99</sup> the takings clause,<sup>100</sup> the equal protection

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97. See *Mallard v. District Court*, 490 U.S. 296 (1989) (noting that the constitutional issues were not reached because the federal *in forma pauperis* statute permitted the district court to "request" a lawyer's volunteered services, but did not require those services). The majority recognized the moral obligation to serve arising from professional tradition; the minority of four would uphold a statute under which a lawyer could not decline a court appointment without an adequate reason, such as conflict of interest, undue hardship, or lack of competency to handle the particular matter. See *id.*

98. A program of uncompensated assignment in criminal cases would be the most objectionable, because there the state would be placing an obligation it is constitutionally required to perform upon a subgroup of lawyers who are qualified to handle criminal cases. See *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966) (stating that, although lawyers have a professional obligation to accept an appointment to represent an indigent defendant, this service should be compensated).

99. The First Amendment challenge to mandatory pro bono rests on an assertion that compelled representation, by requiring a lawyer to espouse values or ideas that may be disagreeable to her, violates expressive autonomy. See *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state may not require a citizen to carry an ideological message on the his or her license plate). A lawyer does not endorse a client's views and is prohibited from expressing a personal opinion about the client's case. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983). The argument properly applies only to appointed representation of a specific client and not to a program in which a lawyer has wide choice as to how the obligation is met. See *id.*

100. The practice of law is a property interest protected under the takings clause of the Fourteenth Amendment. See *Konigsberg v. State Bar*, 353 U.S. 252 (1957). Thus it is argued that a state program that takes a portion of this interest without compensation is unconstitutional. The courts have rejected this argument: a requirement that a relatively small number of hours be devoted to public service falls short of a "taking;" and the bar's historic traditions of public service and response to court appointments support the enforcement of a pub-

clause,<sup>101</sup> or the prohibition of involuntary servitude.<sup>102</sup> A mandatory pro bono program requiring, 20 hours a year of work for poor clients in civil matters raises fewer constitutional questions than does the court appointment practice.<sup>103</sup>

The extreme libertarian argument that the imposition of a modest pro bono obligation on lawyers constitutes involuntary servitude violative of the Thirteenth Amendment is implausible.<sup>104</sup> The practice of law is a regulated industry, infused with the public interest. Requiring a lawyer to donate a limited amount of time, or a corresponding amount of money, to a justice-related cause is not unconstitutional. However, there is a larger issue of whether it is wise and desirable. This is a normative question resting upon an assessment of competing moral claims and of prudential considerations such as the seriousness of the social need and the relative desirability of alternatives.

Second, opponents of mandatory pro bono argue that converting a gift of volunteered service into a compelled exaction spoils the moral significance of the basic choice we all should make. Such choices are the embodiment of what it means to be a good lawyer.<sup>105</sup> In a sense, the concept of mandatory pro bono is an oxymo-

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lic service obligation. See, e.g., *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695 (D.C. Cir. 1984) (noting that compulsory appointment of a lawyer was not a taking); *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965) (stating that uncompensated representation of indigent criminal defendant is not a taking). See Shapiro, *supra* note 1, at 770; Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366 (1981); but see *State ex rel. Scott v. Roper*, 688 S.W.2d 757 (Mo. 1985) (suggesting that uncompensated service presents a constitutional question); *State ex rel. Stephan v. Smith*, 242 Kan. 336, 370, 747 P.2d 816, 842 (1987) (noting that a lawyer's time is a property interest protected by the takings clause).

101. See Rosenfeld, *supra* note 1, at 294 (discussing equal protection issues in court appointment of lawyers).

102. The claim that a required public service obligation is "involuntary servitude" violative of the Thirteenth Amendment has been and should be rejected where the obligation constitutes only a modest number of hours per year. An obligation of this kind may be viewed as an imposition or as a tax, but not as the kind of physical restraint and total loss of freedom that characterizes the "involuntary servitude" prohibited by the Constitution. Unlike a slave, a lawyer always has the option of pursuing other endeavors. See Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 378-382 (1981).

103. See Montague, *Take This Case for Free . . . or Else*, A.B.A.J. May, 1989, at 54 (discussing programs of court appointment).

104. See Millemann, *supra* note 1, at 70 (stating that conditions of servitude do not exist without the threat of legal confinement or physical restraint as an alternative to service).

105. See *id.* at 64 (stating that opponents of mandatory pro bono argue that requiring lawyers to help the poor would deprive them of the feeling of self-satisfaction they derive from doing volunteer work. Proponents of pro bono point out that pro bono work is not

ron, like military music. The pro bono concept has at its heart the idea of the committed citizen who chooses to further the public interest rather than exclusively his own.<sup>106</sup> Is the moral significance of this choice decreased when the ideal of aspiration is replaced by the morality of duty? Will duty produce better results than the continued assertion of moral obligation? The better view embraces the preference of private choice over public mandate. There is some validity to George Bush's "thousand points of light." Requiring citizens to work on the roads or to staff soup lines as a civic obligation is at odds with present-day notions of liberty and moral choice. Arguably, taxing them to provide these services is less of an imposition.

Law, as well as moral thinking, distinguishes between the payment of money and compelled services. Just as specific performance is thought of as an exceptional remedy as distinct from an award of damages,<sup>107</sup> ordering an individual to provide services is more intrusive upon the core of individuality than a general law requiring the same individual to pay money (e.g., a portion of income). Although taxation can be onerous, requirements that take the form of personal service are more likely to result in angry or principled opposition.

Finally, mandatory pro bono proposals tend to be regressive and inequitable, imposing a heavy burden on economically marginal lawyers and harried associates, while treating more gently those at the senior ranks of large law firms. The Marrero proposal does not avoid this unfairness. The senior partners of a large law firm can meet their pro bono obligation by assigning an associate to work six months in a legal services office or by pooling dollar contributions to hire a full-time poverty lawyer at the much lower paying poverty-law scale.<sup>108</sup> These alternatives are either unavailable or impracticable for the solo practitioner or the small-firm lawyer. Moreover, the \$1,000 tax is highly regressive when applied to lawyers who are earning, respectively, \$30,000 and \$300,000. A proposal framed in terms of a percentage of income or a percentage of legal fees would more fairly reflect economic reality. There is a further argument that a tax on lawyers' fees or income is a highly visible way to provide

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meant to benefit the lawyer, but to provide legal aid to the poor).

106. *See id.*

107. *See* 3 E. FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.6 (1982) (stating that equitable relief will not be granted if money damages are adequate).

108. *See* MARRERO REPORT, *supra* note 6, at 797-99 (discussing the possibility of allowing groups to assign one or more members to perform qualifying services to satisfy the group's combined time requirements).

resources for civil legal assistance for the poor. When the costs of a social program are buried in a less visible "professional obligation," issues concerning alternative ways to provide low-cost legal services to the poor are also submerged.

The underlying issue, of course, is whether lawyers should be singled out for this tax. We do not expect farmers or grocers to feed the poor, or doctors to devote a substantial portion of their income to subsidized health care.<sup>109</sup> These occupational groups are not expected to undertake an obligation to meet these massive social problems. Instead, we look to the general taxpayer for support. Taking a different view with respect to lawyers must rest on arguments that lawyers are different because law is different.<sup>110</sup> Law is the glue that holds the community together; lawyers are given exclusive privileges in maintaining and operating the legal infrastructure. Part of the *quid pro quo* for this professional monopoly is the obligation to insure that the less fortunate have access to the legal system.<sup>111</sup>

#### A DUTY TO SERVE?

Some lawyers will resolve the issue on the basis of the practical and moral considerations just discussed. But others will be more influenced by fundamental ideas of what it means to be a lawyer. Is there a professional obligation to insure that the legal needs of everyone are met without regard to ability to pay? Legal practitioners for centuries have provided no-fee or reduced-fee services to causes they thought worthwhile and professional aspirations have included the moral assertion that the individual lawyer should participate in public interest endeavors. However, this moral claim has not hardened into a mandatory obligation. David Shapiro's careful analysis of the history of court assignments of counsel in England and the United States concludes that "[t]o justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there."<sup>112</sup> Shapiro also concludes that the response of American courts to lawyers' objections to compulsory service "has been far from unanimous from the very beginning and has become increasingly fractionated in recent de-

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109. See *id.* at 782.

110. See *id.*

111. See *id.*

112. Shapiro, *supra* note 1, at 753.

cedes."<sup>113</sup> The majority in the Supreme Court's divided decision in *Mallard v. District Court*<sup>114</sup> relied on Shapiro's study in declining to interpret a federal statute as requiring a lawyer to perform uncompensated services for an indigent civil litigant.

Does a mandatory obligation flow directly from ideas of "professionalism?" One argument of this character is based on the historical tradition, just discussed, of lawyers devoting substantial time to worthy causes and of responding to court appointments. No one disputes the tradition; the issue is whether it is confined to a moral obligation—a duty of aspiration—and whether putting it in mandatory form is inconsistent with that tradition. A second argument rests on the fact that the lawyer's license is an exclusive privilege—non-lawyers are prohibited from engaging in "the practice of law." The functionalist view of a profession often includes the assertion of a *quid pro quo* between society and the profession: the profession agrees to undertake public service obligations in return for privileges that protect it from internal and external competition, thus providing practitioners with the material security that makes possible uncompensated public service.<sup>115</sup>

Although this approach may have had some validity in the small-town America of the past, in which the fees of a secure and well-established lawyer would vary with the client's ability to pay, it is fanciful in today's world.<sup>116</sup> Nearly 800,000 lawyers are engaged in an increasingly competitive search to find and retain paying clients. A small number of large law firms, who are in a special position to charge high fees for important transactions or litigations in which they are viewed as having superior qualifications, may still be partly

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113. *Id.* at 753.

114. 490 U.S. 296 (1989) (holding that 28 U.S.C. § 1915(d), providing that a court may "request" an attorney to represent an indigent litigant in a civil case, does not require an unwilling attorney to accept the appointment); see also Hazard, *After Professional Virtue*, 1989 SUP. CT. REV. 213 (reviewing *Mallard* and the traditional ethical obligation of lawyers to volunteer for pro bono work).

115. See generally J. KULTGEN, *supra* note 59 (arguing that the special privileges of certain professions give rise to some public responsibilities); Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 568 (1985) (stating that the professional ideal seeks to cultivate an altruistic orientation, but is premised on organizational modes that "immunize their members from certain commercial pressures and . . . guarantee them a secure threshold of material welfare.")

116. For a discussion of changes in the structure of the legal profession and competition in the marketplace for legal services, see Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* (R. Dingwall & P. Lewis eds. 1983).



shielded from market pressures. But, the mass of lawyers, both in the corporate-law firm sector and in the individual-client service sector, are operating in a competitive market place.

Further, it is no longer accurate to speak of a professional monopoly. Growth in the number of lawyers, the abandonment of restraints against internal competition (e.g., advertising and solicitation of clients, minimum fee schedules, and barriers to new forms of delivery such as closed plans in prepaid legal services), and changes in legal culture have reduced or eliminated opportunities for cross-subsidization. External competition from other service providers is also increasing, with the consequence that the prohibition of unauthorized practice of law is being narrowed to in-court representation.

Many policy arguments support a continued reliance on competition to protect consumers and to provide them with more options. Lawyers should operate in a much more open and competitive marketplace for services of all kinds. Lawyers do have special responsibilities for the maintenance of a just legal system, but each lawyer should not be viewed as a resource that can be tapped to meet general social needs. A more desirable alternative to mandatory pro bono, in my view, is an increase in public funding of civil legal assistance for the poor and a deregulation of the marketplace for services that would provide more low-cost alternatives.

#### ALTERNATIVES TO MANDATORY PRO BONO

My conclusion is that the need for legal services for poor people is great but other alternatives are preferable to mandatory pro bono. What are the alternatives?

First, the moral obligation of lawyers to serve those who need help, but cannot afford to pay, should be continually reasserted. Well-organized programs that encourage and facilitate private bar participation in publicly-funded legal services programs should be implemented by state and local bar associations. The effectiveness and number of volunteer participants can be improved. Much is already being done in this regard. There is serious debate in a number of law schools whether they can do more to nurture the public service impulse in future lawyers.<sup>117</sup> A few law schools, including Tulane and

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117. See Kornhauser, *Mandatory Pro Bono Sought for Law Schools*, Legal Times, Oct. 29, 1990, at 6, col. 1. An all-day program at the AALS annual meeting (Jan. 3, 1991) was devoted to law school measures that might assist in realizing the professional ideal of service, including pro bono programs for law students.

Pennsylvania, have made public service a part of the required law curriculum.<sup>118</sup> Although an accreditation requirement that would give law schools no options is unfavorable, it is desirable that schools who choose to require public service as part of their curriculum provide this model for those who want to enter the profession.

Second, individual lawyers and the organized bar should favor the expansion of publicly funded legal services programs. Federal funding should be increased substantially. Furthermore, state and local support should be enlarged through increased appropriations and private giving. One dramatic new source of funding are programs that devote the interest earned on lawyers' trust accounts (IOLTA), is already producing dramatic results.<sup>119</sup> The funds generated by IOLTA programs increase dramatically when participation is required, an approach that is not a substantial invasion of the autonomy of lawyers or the property of clients.<sup>120</sup> Part of the increased funding, as now, should be devoted to improved utilization of the volunteered activities of private lawyers (e.g., through pro bono coordinators and training programs in local legal services organizations).

Third, the bar should seek to further the competitive marketplace in the delivery of routine legal services by abandoning some restrictive practices that reduce the availability and increase the cost of routine legal services. The prohibition on the unauthorized practice of law should be limited to representation in contested court proceedings.<sup>121</sup> The current restraints on form of practice (e.g., prohibition of participation by non-lawyers in the ownership and management of organizations providing legal services) should be drastically curtailed, if not eliminated.<sup>122</sup> Provision of a greater variety of service alterna-

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118. *Id.*

119. See Rhudy, Remarks at LSC Conference, *supra* note 51. IOLTA programs will generate about \$140 million in 1990, most of which is devoted to civil legal assistance. "Where lawyers are required to participate, the funds raised by IOLTA programs are substantial . . . . In less than five years, California's mandatory program raised \$40 million." G. HAZARD, JR. & S. KONIAK, *THE LAW AND ETHICS OF LAWYERING* 565 (1990).

120. See *Cone v. State Bar*, 819 F.2d 1002 (11th Cir. 1987) (upholding Florida's mandatory IOLTA program against claim that it consisted an unconstitutional taking of property without just compensation); *Carroll v. State Bar*, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305 (1985) (upholding the California mandatory program against various constitutional challenges).

121. See Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) (discussing the bar's efforts to suppress the unauthorized practice of law as well as collecting and discussing statutes and cases from all states).

122. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1983) (prohibiting any non-lawyer ownership of or profit participation in an organization providing legal services).

tives to all Americans, many of them at substantially lower cost, may be perhaps the most important step in improving access to justice on the part of the poor. The situation of most persons who are below the poverty line is not much different from the millions who are just above it: they can patch together modest amounts of money to pay for much-needed services. But this can be done only if the charges are low and the services readily available.

Finally, it should be remembered that inducements and rewards are often more efficacious in changing behavior than commands or threats of punishment. Fee-shifting arrangements that reimburse prevailing plaintiffs for litigation costs, including attorney's fees, have the effect of providing highly competent counsel to those who seek damages to enforce violations of statutory rights.<sup>123</sup> Legislative attention should be directed to the proper scope and application of one-way fee-shifting statutes. This technique is less efficacious when litigation seeks only injunctive relief or when the needed legal service is transactional rather than in a litigation format (e.g., drafting legal documents). Because there is a special risk of lack of proportionality in expenditures on legal services if the full amounts are paid by the public, some protections must also be included for defendants who are put to great expense in defending litigation that turns out to be non-meritorious.

#### COMPETITION IN THE LEGAL SERVICES MARKETPLACE

This is a time of enormous change in the nature and structure of law practice in the United States.<sup>124</sup> There is widespread recognition of the fact that the legal services industry is a much more competitive market place than it has been in the past. Restraints against competition within the profession, such as the prohibitions of advertising, solicitation, and referral fees, have been largely abandoned.<sup>125</sup> Increases in the demand for legal services have led to the entry of an enormous number of new lawyers. Competitive pressures for legal

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123. See *Evans v. Jeff D.*, 475 U.S. 717 (1986) (discussing the effects of one-way fee shifting statutes on the availability of lawyers to plaintiffs who have meritorious claims). David Luban proposes two-way fee shifting (the loser paying the winner's litigation costs) in civil cases in which a publicly-funded lawyer is engaged in litigation with a privately-retained lawyer. In order not to discourage meritorious cases or to encourage unmeritorious ones, the attorney-fee award would be limited to a modest statutory schedule, as in Germany. See LUBAN, *supra* note 1, at 273-277.

124. See generally ABEL, *supra* note 19.

125. *Id.* at 119-26.

business have increased the variety and quality of available service.<sup>126</sup> Specialization and the increased use of paralegals have lowered the cost and increased the quality and variety of routine legal services. These developments, which have increased substantially the total demand for legal services, have primarily benefitted middle-income Americans, although some benefits have flowed to lower-income people.

Routine legal services to individual Americans (wills, uncontested divorces, simple bankruptcies, residential home transactions, and the like) are best met by arrangements which assure quality control, accountability, and a competitive price. Lawyers will increasingly be competing with organizations staffed largely by paralegals in providing these routine services. Seven years of higher education is not required for most repetitive transactions of this character. Elimination of the restrictions on the unauthorized practice of law would further current developments and help provide legal services to low-income people.

What about those whose income is so low that a few hundred dollars for an uncontested divorce is not available? An expansion of the federally-funded legal services program is a possibility here. Such a solution would both increase the availability of staff lawyers and add judicare alternatives in matters like divorce and bankruptcy which many qualified private practitioners can handle. A tripling of the federal expenditure on this program, from \$300 million to \$1 billion, would help meet current needs.

Finally, the continued assertion of the moral obligation of all lawyers to devote themselves to the legal needs of the poor, as well as to other major interests of the justice system, can continue to expand the number of private lawyers who are volunteer participants. Not every one will respond. Perhaps it is unrealistic to expect that more than one-fourth of lawyers will participate. At least those who do take part will do so cheerfully and responsibly.

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126. *Id.* at 74-111.